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ABSTRACT

This paper discusses the legal precedents that have supported the official recognition of homosexual organizations by universities and colleges. Among the court cases that are reviewed are the following: (1) Brandenburg v. Ohio (1969), which ruled that expressions not inciting unlawful behavior may not be subject to government restraint; (2) Healy v. James (1972) and Wood v. Davison (1972), which ruled that First Amendment rights of freedom of association applied to students, and as a result, official university recognition was necessary to protect that right; (3) Gay Students Organization of the University of New Hampshire v. Bonner (1974), which ruled that mere speculation of future illegal activity was an insufficient reason for regulation by the university; and (4) Gay Rights Coalition of Georgetown University (1981, 1983) and Gay Rights Coalition v. Georgetown University (1987), a nearly decade long struggle which culminated in the decision that the Catholic university had denied recognition of the association based on the groups' sexual orientation, not just because the groups' purposes and activities conflicted with Catholic doctrine. It is concluded that, based on these court cases and others, the courts will not allow college and university administrators to control the philosophical nature of student organizations nor the lifestyles of those individuals with whose ideas they disagree. Contains seven references. (GLR)

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A legal history:

University recognition of homosexual organizations

Loren J. Rullman

Homosexual student organizations have become an especially controversial issue in the last 10 to 15 years. The courts have held that denying official university recognition of college student organizations abridges individuals' First Amendment rights. There are legal and moral reasons why homosexual student organizations, as well as other qualified organizations, should be officially recognized. Official recognition may mean prosperity and growth for a college student organization and its members while denial of such recognition may lead to lack of growth and failure. Furthermore, student affairs professionals should ensure that official student organizations receive the benefits associated with recognition, which often include:

1. Use of campus facilities, usually rent free
2. Opportunities to use campus media
3. Opportunity to lease a campus post office box
4. Right to establish dues and sponsor money-raising projects
5. Right to request funds from the student activities fund
6. Privilege of using institution's name as part of organization's name
7. Right to post notices and appropriate signs announcing activities
8. Privilege of being listed in student handbook and yearbook
9. Opportunity to qualify for awards and honors given to student organizations
10. Right to invite speakers onto campus (Gibbs, 1979, 1984)

While not complete, this list does demonstrate the importance of recognition. Case law throughout the years has proven that public institutions of higher education must afford all the rights and responsibilities that are afforded to non-gay student organizations to homosexual student organizations.

The First and 14th Amendments to the U.S. Constitution are key to any discussion of freedom of expression. The First Amendment states:

> *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of people peaceably to assemble, and to petition the Government for a redress of grievances.*

Whereas the First Amendment protects individuals' freedoms from Congressional acts, the 14th Amendment extends that protection, barring states from impairing personal rights. The 14th Amendment (Section I) states:

> *All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

One of the earliest cases laying legal foundation for this issue was Brandenburg v. Ohio, 1969. In this case, it was decided that "expressions, including ancillary expressive conduct and expression, not calculated or likely to incite unlawful behavior may not be subject to government restraint" (Gibbs, 1984, p. 39). Although this case set the legal framework for the question of recognition of college student organizations, the landmark cases occurred in 1972 (Healy v. James, 1972; Wood v. Davison, 1972). The Supreme Court and the United States Dis-

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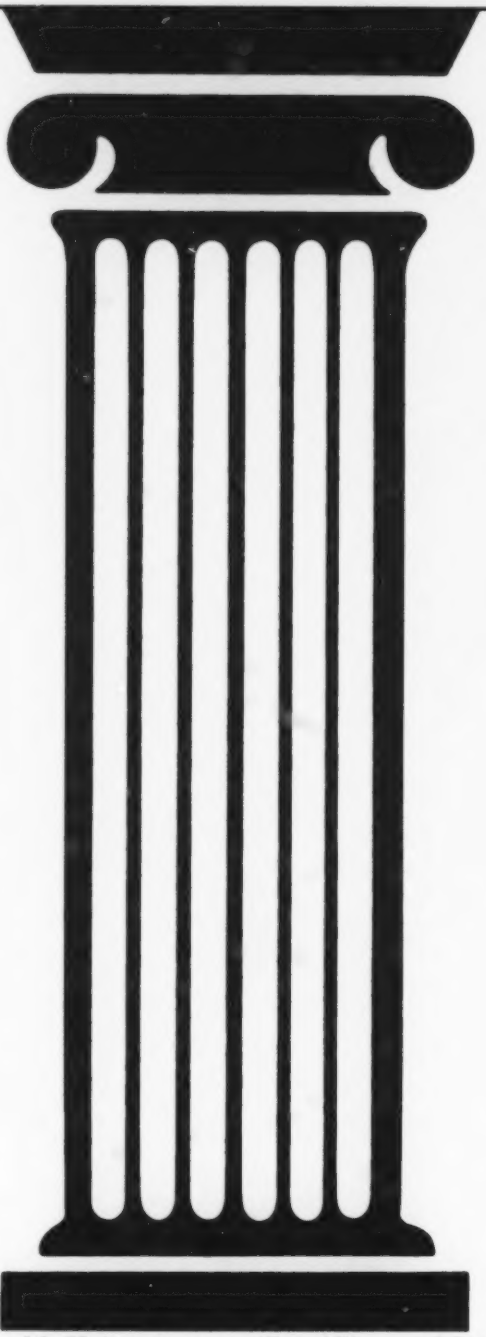


trict Court N.D. in Atlanta ruled in Healy that the First Amendment rights of freedom of association applied to students, and as a result, official university recognition was necessary to protect that right. Gibbs (1979) quoted the court's decision:

> *While the freedom of association is not explicitly set out in the [First] Amendment, it has long been held to be implicit in the freedoms of speech, assembly and petition. There can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges that right.*

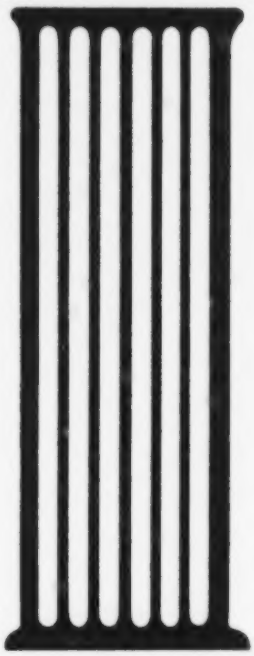
It is important to point out that the court was not advocating special treatment of gay student organizations, rather equal treatment of all student organizations. Healy established that a university should recognize an organization provided it meet three criteria:

1. The student organization must comply with all procedural requirements and reasonable university policies.
2. The student organization must not demonstrate a danger or violence against or disruption of the educational purpose of the institution.
3. Neither the organization nor any of its members may violate either federal or state law throughout a group function.

Although most universities could accept the first two criteria, some denied recognition based on state criminal statutes banning sodomy or lascivious conduct. These schools argued that recognizing a homosexual student organization would lead to increased activity in violation of these statutes. In Gay Students Organization of the University of New Hampshire v. Bonner, 1974, the Court ruled against the university stating that mere speculation of future illegal activity was an insufficient reason for regulation by the university. In a Virginia Commonwealth University case (Gay Alliance of Students v. Matthews, 1976) the Court of Appeals ruled that although Virginia law prohibited the practice of certain forms of homosexuality, being a homosexual was not a crime according to Virginia law (Gibbs, 1979). As a result of these and other cases, courts have ruled that the university can limit an organization's rights only when a group sponsors functions leading to illegal activity or controls or directs illegal conduct.

The Healy (1972) ruling clarified the relationship between universities and student organizations and provided a basis for ruling that universities could not withhold recognition for fear that the public would perceive recognition as university approval of certain student organizations. The Healy (1972) case proved instrumental in the 1979 case of Student Coalition, Etc. v. Austin Peay State University. In this case the university denied the Coalition recognition as a student organization based on the following assertions: (1) that recognition may cause the perception of university approbation of the Coalition and its goals and homosexual behavior; and (2) that recognition would result in possible increased homosexual activities in violation of Tennessee law. The Court, relying on Healy (1972), ruled against the university. The Court stated that the university's assertion that recognition of the Coalition implied approval of homosexuality was not a satisfactory justification for abridging the advocacy. In addition, the Court declared illegitimate the university's concern that organizational advocacy of homosexuality would increase incidence of homosexuality.

The Court again relied on Healy (1972) in Gay Activists Alliance v. Board of Regents of the University of Oklahoma, 1981. The university had denied recognition to the Gay Activists Alliance based on the following assertions: (1) that it had a duty to recognize only those groups that reflected public policy as established by prevailing community standards; (2) that it had a duty to act for the benefit of university students' health, welfare, and morals; (3) that the Gay Activists Alliance endorsed and promoted behavior which violated Oklahoma state law; and (4) that to recognize the group implied endorsement of its philosophy but to withhold recognition denied no constitutional rights because the group could still assemble and associate. The unique aspect of this case was the University of Oklahoma argument that because it had not restricted students' freedom to assemble, no constitutional rights were violated. The Court struck down these arguments stating that Healy (1972) and various other Circuit opinions held that even the more subtle denials of recognition infringed on First Amendment guarantees. Also, the mere speculation that the group would violate state law or university disagreement with the group's entirely legal—albeit unpopular—goals was insufficient to justify the denial of recognition.



The Healy ruling clarified the relationship between universities and student organizations and provided...ruling that universities could not withhold recognition for fear that the public would perceive recognition as university approval of certain student organizations.

One of the most interesting cases has spanned almost a decade (Gay Rights Coalition of Georgetown University Law Center v. Georgetown University, 1981, 1983; Gay Rights Coalition v. Georgetown University, 1987). Georgetown University was founded by a Jesuit bishop and granted a charter by the federal government in 1815. It is currently run under contract by the Society of Jesus, and its policies are heavily influenced by Roman Catholic doctrine. Two gay student organizations which had been denied university recognition brought action against the university under the District of Columbia Human Rights Act, which states in part:

> *It is unlawful discriminatory practice...for an educational institution: (1) To deny, restrict, or to abridge or condition the use of, or access to, any of its facilities and services to any person otherwise qualified, wholly or partially for a discriminatory reason based upon, the race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, political affiliation,*

source of income or physical handicap of any individual... (The College Student and the Courts, June 1988, p. 774)

The initial ruling in 1981 held that the denial of recognition discriminates against the gay organization on the basis of sexual orientation in violation of the District of Columbia Human Rights Act unless the university action is protected by the First Amendment guarantee of religious freedom (Gibbs, 1984). In Gay Rights Coalition of Georgetown University Law Center v. Georgetown University, 1983, the Court pronounced that the beliefs on which the university acted are "rooted in religion" and are central and sincere to the religion. It also held that courts are not arbiters of scriptural interpretation and therefore no inquiries could be made into whether Georgetown University correctly perceived or applied the commands of the Catholic faith. The Court summarized that "the District of Columbia Human Rights Act must yield to the constitutional guarantee of religious freedom..."

Both groups...were denied recognition on the basis that recognition "would be interpreted by many as endorsement, support, and approval of the position taken by the gay movement..." and would not be appropriate for a Catholic university.

In 1987 the District of Columbia Court of Appeals struck a more balanced decision in an attempt to appease both sides. Again the two gay student organizations attempted to obtain full university recognition by invoking the District of Columbia Human Rights Act. It is important to note Georgetown University's three levels of recognition:

(1) Student Body Endorsement—This recognition is granted by the Student Activities Commission and is available to any group meeting minimum criteria and whose activities are within the scope of the student body interest and concern, serving an educational, social, or cultural purpose. These groups may use university facilities, apply for lecture fund privileges, receive financial counseling, use campus advertising, and petition to obtain student government assistance.
(2) University Recognition—This requires approval of the university administration after obtaining student body endorsement. To obtain this level of recognition, groups must successfully aid in the university's educational mission as contained in its Statement of Educational Goals and Objectives and provide a broad service to the university community. This service may not be limited to an immediate or special interest. This type of recognition includes, in addition to the benefits listed above, a mailbox in the student activities commission office, computer label service, mailing services, and applications for funding.
(3) University Funding—Groups receiving university recognition may apply for funding, but it is not guaranteed. However, this level of recognition includes all of the benefits listed above and actual university funding (The College Student and the Courts, June 1988).

Both groups had been granted the first stage of recognition but were denied university recognition on the basis that recognition "'would be interpreted by many as endorsement, support, and approval of the position taken by the gay movement on a full range of issues...' and would not be appropriate for a Catholic university" (The College Student and the Courts, June 1988, p. 774). The university asserted that its denial of recognition was not based on sexual orientation, but on the "purposes and activities" of the organization, but even if its denial had been based on sexual orientation, the university's First Amendment rights of Free Exercise would exempt it from the District of Columbia Human Rights Act.

Four main issues were involved:

1. Does the District of Columbia Human Rights Act require endorsement of homosexual groups? The Court found that the Act's plain language only prohibited the denial of "services and facilities" on a discriminatory basis; it did not require endorsement. Thus, Georgetown University's right to express opinions based on Roman Catholicism included the right to grant university recognition only to those groups it regarded as upholding Roman Catholic beliefs.
2. Is university recognition the same as endorsement? The Court found the answer to be "yes," stating that recognition was not automatic and reserved for all student groups. By recognizing a group, the university lends its name and services to the group and thus publicly supports its endeavors.
3. Does the District of Columbia Human Rights Act require that "services and facilities" be available to student groups without regard to sexual orientation and did Georgetown University deny those "services and facilities" to the groups based on their sexual orientation? The Court held that the tangible benefits of university recognition

such as a mail box, mail services, computer labels, etc., amount to "services and facilities" and cannot be denied on a discriminatory basis. It was ruled that Georgetown University had denied these benefits based on the groups' sexual orientation, not just because the groups' "purposes and activities" conflicted with Catholic doctrine.

The College Student and the Courts reported the case:

It was apparent...that Georgetown's denial of tangible benefits was not closely tied to specific purposes and activities of the student groups promoting the homosexual conduct condemned by Roman Catholic doctrine. The conclusion is inescapable that the predominantly gay composition of the student groups played at least some role in their treatment by Georgetown. By objecting to the student group's assumed connection by definition to a full range of issues associated with the gay movement, rather than to specific purposes and activities inconsistent with its Roman Catholic tradition, Georgetown engaged in the kind of stereotyping unrelated to individual merit that is forbidden by the Human Rights Act. (June 1988, p. 775)

4. Was the university exempt from the provisions of the District of Columbia Human Rights Act by virtue of the Free Exercise Clause of the First Amendment? The court found Georgetown University's burden of recognizing groups in conflict with its role as a Roman Catholic institution sufficient to draw upon the Free Exercise Clause. The Court ultimately decided, however, that the District of Columbia Human Rights Act was originally invoked to reduce discrimination based on sexual orientation in educational institutions and that Georgetown University's burden was relatively insignificant in comparison to its responsibility to the District of Columbia Human Rights Act. In an attempt, then, to balance the competing interests of the university and the government in the least restrictive way to Georgetown University's religious practice, the Court ruled that providing equal access to "services and facilities" without endorsing the gay student groups imposed a "relatively slight burden on Georgetown's religious practice" and thus should be done.

Until the last few years, most court cases were concerned primarily with whether gay student organizations should be fully recognized as official student organizations. The dilemma was shaped by moral issues. One of the most recent cases (Gay and Lesbian Students Association v. Gohn, 1987, 1988) concerned the withholding of funds to gay student organizations.

The Gay and Lesbian Students Association, a properly registered student organization at the University of Arkansas, sought and was denied funds from the associated student government. The Gay and Lesbian Students Association brought suit claiming that funding is a benefit stemming from registration as a student organization and the denial of funding constituted a "content based" discrimination against the Gay and Lesbian Association for exercising its rights of association and free speech under the First and 14th Amendments. The Association claimed that the rights to equal protection under the 14th Amendment had also been violated.

The Court declared that denial of funding constituted "state action" because the student senate and the associated student government were created by the state, and the student government constitution, which outlines funding procedures, was approved by the board of trustees which has statutory authority to govern the university. (State action describes a relationship where the institution, private or public, is responsible to the state and its laws because it receives a sizable portion of funding from the state.) The court also pointed out that the associated student government received funding from the state and that funds that were disbursed came from university appropriations where the vice chancellor had

The Court held that the tangible benefits of university recognition such as a mail box, mail services, computer labels, etc., amount to "services and facilities" and cannot be denied on a discriminatory basis.

final decision-making powers in funding decisions through his power to hear appeals. These factors provided for the infusion of "state action." As for whether the Gay and Lesbian Students Association was entitled to funds, the decision stated that the courts have traditionally stopped short of including the right of receiving funds as a basic right due all campus organizations and that the denial of funds was not a barrier to the organization's First Amendment rights. However, the Court of Appeals ruled in Gay and Lesbian Students Association v. Gohn, 1988 that all funds must be distributed in a "viewpoint-neutral manner, absent other considerations" (The College Student and the Courts, December 1988). The Court noted that some student senators freely admitted they had voted against the organization because of its views and that state legislators were pressuring university officials not to fund the group or to allow the dissemination of opinions tolerant of homosexuals. In summary, the Court declared that the government cannot discriminate against people simply because it does not agree with their ideas. At the time of this writing, this case was the last case to be examined by the courts as discussed in higher education literature.

Some student senators freely admitted they had voted against the organization because of its views and that state legislators were pressuring university officials not to fund the group or...allow the dissemination of opinions tolerant of homosexuals.

The question of student organization recognition and acceptance is legally intertwined with constitutional rights guaranteed these groups. The courts will not allow college and university administrators to control the philosophical nature of student organizations nor the lifestyles of those individuals with whose ideas they disagree. Student affairs professionals must be aware of not only student development theories and models but also the legal responsibilities of working with students and student groups. In this litigious age, we have a duty to help students and other administrators become aware of their legal responsibilities for this too is a part of student and professional development. Additionally, it is our responsibility to participate in the educational process on campus. That may include investigating possible incidences of social, sexual, and racial injustice and subsequently working to defeat those injustices. These are only some of the issues that gay student organizations face. As persons educated and interested in the need for a healthy and holistic educational environment, we should be participants, not observers, in the process of legal and moral justice. But most importantly, we must always be sensitive, tolerant, and appreciative of diversity on the college campus.

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